BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF THE STATE OF CALIFORNIA

AB-9057
File: 20-388708 Reg: 08069872

7-ELEVEN, INC., FIROUZEH MEHRKHODAVANDI, and MEHRDAD MONDEGARI,
dba 7-Eleven Store 2133 13901D
3309 Kimber Drive, Thousand Oaks, CA 91320,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John W. Lewis

Appeals Board Hearing: September 2, 2010
Los Angeles, CA

ISSUED OCTOBER 25, 2010

7-Eleven, Inc., Firouzeh Mehrkhodavandi, and Mehrdad Mondegari, doing business as 7-Eleven Store 2133 13901D (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days for their clerk selling an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Firouzeh Mehrkhodavandi, and Mehrdad Mondegari, appearing through their counsel, Ralph Barat Saltsman, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

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[1]The decision of the Department, dated July 22, 2009, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on October 7, 2002. On October 22, 2008, the Department filed an accusation against appellants charging that on March 7, 2008, appellants' clerk, Ranasena A. Gamage (the clerk), sold an alcoholic beverage to 18-year-old Cody Bucaria. Although not noted in the accusation, Bucaria was working as a minor decoy for the Ventura County Sheriff's Department at the time.

At the administrative hearing held on June 10, 2009, documentary evidence was received and testimony concerning the sale was presented by Bucaria (the decoy), by Timothy Ragan, a Ventura County Deputy Sheriff, and by the clerk.

The Department's decision determined that the violation charged was proved and no defense to the charge was established.

Appellants then filed an appeal contending: (1) the decoy operation was not conducted in a manner which promotes fairness under rule 141(a), (2) a proper face-to-face identification of the clerk under rule 141(b)(5) was not conducted, and (3) factors in mitigation were not considered.

DISCUSSION

I

Appellants contend that the decoy operation was not conducted in a manner which promotes fairness under rule 141(a)[2] because the decoy was instructed by the deputy sheriffs to purchase an alcoholic energy drink with an appearance very similar to

[2] California Code of Regulations, title 4, section141, subdivision (a) states: "A law enforcement agency may only use a person under the age of 21 years to attempt to purchase alcoholic beverages to apprehend licensees, or employees or agents of licensees who sell alcoholic beverages to minors (persons under the age of 21) and to reduce sales of alcoholic beverages to minors in a fashion that promotes fairness."

that of a well-known non-alcoholic beverage. Appellants maintain that the selection of Joose was an attempt to trick the clerk into selling an alcoholic beverage to the decoy. It is also appellants' position that the fairness required by rule 141(a) was violated when the decoy was given a list of such alcoholic beverages by the deputies and told to purchase one of them; Joose was the first beverage on the list.

Appellants are asking the Board to find that the administrative law judge (ALJ) abused his discretion when he rejected their fairness argument out of hand (AOB at p. 5). However, the standard is as follows:

> In determining whether a decision of the Department of Alcoholic Beverage Control is arbitrary, its action is measured by the standard set by reason and reasonable people, bearing in mind that such standard may permit a difference of opinion on the same subject and a reviewing court may not substitute a decision contrary to that made by the department, even though such decision is equally or more reasonable, if the determination by the department is one which could have been made by reasonable people.

(*Kirby v. Alcoholic Beverage Control Appeals Board* (1968) 261 Cal.App.2d 119 [67 Cal.Rptr. 628].)

In the instant case, the ALJ made a determination in his Conclusions of Law at page 4 that it was not unfair for the deputies to instruct the decoy to purchase a beverage which resembled a non-alcoholic drink, because appellants have a duty to train their employees about which beverages are alcoholic. As he stated, "Ignorance that the item being sold is an alcoholic beverage is not an affirmative defense." [*Ibid.*]

A reasonable person would believe that *any* alcoholic beverage could potentially be selected by a decoy in such a situation, in order to ensure that minors are not being permitted to purchase alcohol. Even if a reasonable person could conclude that it

would be more "fair" for the Department to instruct their decoys to purchase beverages which are readily recognizable by anyone and everyone as alcoholic, this Board cannot substitute its conclusion for that of the Department in this regard.

"The Legislature has recognized that the business of selling intoxicating liquors, unless strictly regulated, poses a threat to the welfare of minors. Consequently, under the police power of the state the Legislature laid down the conditions under which such businesses may be conducted in order to minimize its evils." *(Kirby v. Alcoholic Beverage Control Appeals Board* (1968) 267 Cal.App. 2d 895, 899 [73 Cal.Rptr. 352].)

A clerk in a Department-licensed business has a responsibility to know which products are age-sensitive and which are not. A decoy operation which is otherwise properly carried out does not fail because the clerk claims he or she did not know the item was alcoholic, no matter how much the item may resemble a non-alcoholic beverage. To rule otherwise would offer licensees a complete defense to all decoy operations by simply saying “I didn’t know that beverage was alcoholic.”

II

California Code of Regulations, title 4, section 141, subdivision (b)(5) states: “Following any completed sale, but not later than the time a citation, if any, is issued, the peace officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy who purchased alcoholic beverages make a face to face identification of the alleged seller of the alcoholic beverages.” Appellants contend that a proper face-to-face identification of the clerk was not conducted, because the decoy was too far away from the clerk at the time of the identification for the clerk to have been made properly aware that he was being identified.

Appellants rely principally on *Chun* (1999) AB-7287. In that case, the Board stated:

> The phrase "face to face" means that the two, the decoy and the seller, in some reasonable proximity to each other, acknowledge each other's presence, by the decoy's identification, and the seller's presence such that the seller is, or reasonably ought to be, knowledgeable that he or she is being accused and pointed out as the seller.

The *Chun* decision does not require that the decoy and the seller physically face one another. Citing *Greer* (2000) AB-7403, both the Department and appellants in their briefs note that the "acknowledgment" requirement is achieved by "the seller's presence such that the seller is, or reasonably ought to be, knowledgeable that he or she is being accused and pointed out as the seller." The point of disagreement here is that appellants maintain this requirement was not met (AOB pp. 7-8), while the Department argues (RB p. 8), and the ALJ found (Findings of Fact 8), that it was.

Strict adherence to rule 141(b)(5) does not require, as appellants seem to suggest, an "eyeball to eyeball" confrontation. Here, the decoy identified the clerk from a distance of five feet, and made eye contact with the clerk. It cannot be said that there was a failure to comply with the face-to-face identification requirement in this case.

III

Appellants contend finally that factors in mitigation were not considered. However, the Proposed Decision clearly states on page 4: “Respondent’s counsel presented no evidence of mitigation.” The issue of mitigation was not raised by appellants at the administrative hearing and we decline to consider it. (See 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, §400, p. 458.)

The Department has wide discretion in determining appropriate discipline for

licensee misconduct. (*Martin v. Alcoholic Bev. Control Appeals Bd.* (1959) 52 Cal.2d 287, 299 [341 P.2d 296]. "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within the area of its discretion." (*Harris v. Alcoholic Bev. Control Appeals Bd.* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633].)

A suspension of appellants' license for a period of 15 days is in line with the standard penalty of rule 144 (4 Cal. Code Regs. §144), and clearly within the discretion of the Department.

ORDER

The decision of the Department is affirmed.[3]

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[3]This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 et seq.